

## EXEMPTION 7(E)

In sum, Exemption 7(D) traditionally has been afforded a broad construction by the courts in recognition of the compelling law enforcement need to "protect sources and prevent critical information from 'drying up.'"<sup>153</sup> To this end, all federal agencies maintaining law enforcement information should be sure to carefully apply Exemption 7(D)<sup>154</sup> wherever necessary to provide adequate confidential source protection.<sup>155</sup>

## EXEMPTION 7(E)

Exemption 7(E) affords protection to all law enforcement information that "would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law."<sup>1</sup> As discussed below, an ever-growing body of case law demonstrates that this exemption applies to a very broad range of law enforcement information, including national security- and homeland security-related information,<sup>2</sup> insofar as it meets the

---

<sup>152</sup>(...continued)

that Exemption 7(D) is inapplicable to deceased source).

<sup>153</sup> Givner, No. 99-3454, slip op. at 15 (D.D.C. Mar. 1, 2001) (citing Shaw, 749 F.2d at 61); see also Attorney General's 1986 Amendments Memorandum at 13.

<sup>154</sup> Accord Attorney General Ashcroft's FOIA Memorandum, reprinted in FOIA Post (posted 10/15/01) (encouraging agencies to carefully consider the protection of the "fundamental values that are held by our society" -- including that of "enhancing the effectiveness of our law enforcement agencies" -- "when making disclosure determinations under the FOIA").

<sup>155</sup> See Sluby v. U.S. Dep't of Justice, No. 86-1503, 1987 WL 10509, at \*2-3 (D.D.C. Apr. 30, 1987) ("robust' reading of [E]xemption 7(D) is supported by . . . Congressional events"); Randle v. Comm'r, 866 F. Supp. 1080, 1085 (N.D. Ill. 1994) (although most exemptions construed narrowly, confidential source exemption applied "robustly"); accord Irons, 811 F.2d at 687-89 (post-1986-amendment decision extending Exemption 7(D) protection to sources who received only conditional assurances of confidentiality).

<sup>1</sup> 5 U.S.C. § 552(b)(7)(E) (2000 & Supp. IV 2004).

<sup>2</sup> See, e.g., Morley v. CIA, No. 03-2545, 2006 WL 2806561, at \*14 (D.D.C. Sept. 29, 2006) (recognizing that Exemption 7's threshold requirement that records be compiled for "'law enforcement purpose' includes national security-related government activities"); Coastal Delivery Corp. v. U.S. Customs Serv., 272 F. Supp. 2d 958, 963-65 (C.D. Cal. 2003) (affording Exemption 7(E) protection to seaport inspection data because release could lead to identification of "vulnerable ports"), reconsideration denied, id. at 966-68 (C.D. Cal. 2003), appeal dismissed voluntarily, No. 03-55833 (9th Cir. Aug.

(continued...)

## EXEMPTION 7(E)

law enforcement threshold requirement for all of Exemption 7.<sup>3</sup>

Exemption 7(E) is comprised of two distinct protective clauses. The first clause permits the withholding of "records or information compiled for law enforcement purposes . . . [that] would disclose techniques and procedures for law enforcement investigations or prosecutions."<sup>4</sup> This clause is phrased in such a way so as to not require a showing of any particular determination of harm -- or risk of circumvention of law -- that would be caused by disclosure of the records or information within its coverage.<sup>5</sup> Rather, it is designed to provide "categorical" protection to the information

---

<sup>2</sup>(...continued)

26, 2003); Ctr. for Nat'l Sec. Studies v. INS, No. 87-2068, 1990 WL 236133, at \*5 (D.D.C. Dec. 19, 1990) (upholding agency decision to protect final contingency plan in event of attack on United States, as one of several documents that agency withheld that "relate directly to . . . agency's law enforcement duties"); see also *FOIA Post*, "FOIA Officers Conference Held on Homeland Security" (posted 7/3/03) (summarizing authority for protecting homeland security-related information up to that date).

<sup>3</sup> See, e.g., Living Rivers, Inc. v. U.S. Bureau of Reclamation, 272 F. Supp. 2d 1313, 1320 (D. Utah 2003) (determining that agency's use of flood maps to develop emergency action plans for homeland security purposes readily met "compiled for law enforcement purpose" requirement); see also Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice, 331 F.3d 918, 928-29 (D.C. Cir. 2003) (recognizing need for deference to be afforded government's top counterterrorism officials who can best make "predictive judgment of harm that will result from disclosure of information" concerning ongoing national security investigation into 9/11 terrorist attacks) (Exemption 7(A)).

<sup>4</sup> 5 U.S.C. § 552(b)(7)(E).

<sup>5</sup> See, e.g., Peter S. Herrick's Customs & Int'l Trade Newsletter v. U.S. Customs & Border Prot., No. 04-00377, 2006 WL 1826185, at \*7 (D.D.C. June 30, 2006) (acknowledging that first clause of Exemption 7(E) "requir[es] no demonstration of harm or balancing of interests"); Burke v. U.S. Dep't of Justice, No. 96-1739, 1999 WL 1032814, at \*8 (D.D.C. Sept. 30, 1999) (holding that Exemption 7(E) "does not require the FBI to show that disclosure of [FBI Form FD-515] ratings [of effectiveness of investigative techniques] would cause any particular harm"); Coleman v. FBI, No. 89-2773, slip op. at 25 (D.D.C. Dec. 10, 1991), summary affirmance granted, No. 92-5040, 1992 WL 373976 (D.C. Cir. Dec. 4, 1992) (per curiam) ("The first clause of this exemption . . . does not require a determination that harm . . . would be caused by disclosure of the records or information within its coverage."). But see Davin v. U.S. Dep't of Justice, 60 F.3d 1043, 1064 (3d Cir. 1995) (requiring, in an atypical decision, that an agency submit "evidence that specific documents it has withheld contain secret information about techniques for recruiting informants [the disclosure of which] would risk circumvention of the law").

so described.<sup>6</sup>

Notwithstanding the broad scope of Exemption 7(E)'s protection, in order for the first clause of the exemption to apply the technique or procedure at issue ordinarily must not be well known to the public.<sup>7</sup> Accordingly, techniques such as "[i]nterception of wire, oral, and electronic communi-

---

<sup>6</sup> See Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act 16 n.27 (Dec. 1987) [hereinafter Attorney General's 1986 Amendments Memorandum]; see, e.g., Judicial Watch, Inc. v. U.S. Dep't of Commerce, 337 F. Supp. 2d 146, 181 (D.D.C. 2004) (reiterating that first clause of Exemption 7(E) provides "categorical protection" for law enforcement techniques and procedures (quoting Judicial Watch, Inc. v. FBI, No. 00-745, 2001 U.S. Dist. LEXIS 25732, at \*26-27 (D.D.C. Apr. 20, 2001)); Rivera v. FBI, No. 98-0649, slip op. at 9-10 (D.D.C. Aug. 31, 1999) (upholding categorical protection for bank security measures); Smith v. ATF, 977 F. Supp. 496, 501 (D.D.C. 1997) ("Exemption 7(E) provides categorical protection to information related to law enforcement techniques."); Fisher v. U.S. Dep't of Justice, 772 F. Supp. 7, 12 n.9 (D.D.C. 1991) (explicitly recognizing categorical protection for law enforcement techniques and procedures), aff'd, 968 F.2d 92 (D.C. Cir. 1992) (unpublished table decision); see also FOIA Update, Vol. XV, No. 2, at 3 (distinguishing between Exemption 7(E)'s two clauses).

<sup>7</sup> See Attorney General's 1986 Amendments Memorandum at 16 n.27 (citing S. Rep. No. 98-221, at 25 (1983) (citing, in turn, H.R. Rep. No. 93-1380, at 12 (1974)); see also Rugiero v. U.S. Dep't of Justice, 257 F.3d 534, 551 (6th Cir. 2001) (stating that the first clause of Exemption 7(E) "protects [only] techniques and procedures not already well-known to the public"); Becker v. IRS, 34 F.3d 398, 405 (7th Cir. 1994) (concluding that the "investigative techniques used by the IRS with respect to tax protesters . . . unquestionably fall under [Exemption 7(E)]," and implicitly upholding the district court's finding that the techniques at hand were not publicly known); Judicial Watch, Inc. v. U.S. Dep't of Commerce, 337 F. Supp. 2d at 179, 181 (recognizing exemption's protection for techniques "not well-known to the public"); Campbell v. U.S. Dep't of Justice, No. 89-3016, slip op. at 6-7 (D.D.C. Aug. 6, 1997) (declaring that Exemption 7(E) applies to "obscure or secret techniques," and refusing to apply it to "basic" techniques), rev'd & remanded on other grounds, 164 F.3d 20 (D.C. Cir. 1998); Albuquerque Publ'g Co. v. U.S. Dep't of Justice, 726 F. Supp. 851, 858 (D.D.C. 1989) (stating that agencies "should avoid burdening the Court . . . [with] techniques that are commonly described or depicted in movies, popular novels, stories or magazines, or on television").

## EXEMPTION 7(E)

cations,"<sup>8</sup> "mail covers" and the "use of post office boxes,"<sup>9</sup> "security flashes" or the tagging of fingerprints,<sup>10</sup> pretext telephone calls,<sup>11</sup> and "planting transponders on aircraft suspected of smuggling"<sup>12</sup> have been denied protection under Exemption 7(E) when courts have found them to be generally known to the public.

However, even commonly known procedures have been protected from disclosure when "the circumstances of their usefulness . . . may not be widely known,"<sup>13</sup> or their use "in concert with other elements of an investi-

---

<sup>8</sup> Pub. Employees for Env'tl. Responsibility v. EPA, 978 F. Supp. 955, 963 (D. Colo. 1997), appeal dismissed voluntarily, No. 97-1384 (10th Cir. Nov. 25, 1997).

<sup>9</sup> Dunaway v. Webster, 519 F. Supp. 1059, 1083 (N.D. Cal. 1981); see also Billington v. U.S. Dep't of Justice, 69 F. Supp. 2d 128, 140 (D.D.C. 1999) (observing as general matter that "wiretaps or use of post office boxes" are "commonly known" for purposes of Exemption 7(E)), aff'd in pertinent part, vacated in part & remanded on other grounds, 233 F.3d 581 (D.C. Cir. 2000).

<sup>10</sup> Ferguson v. Kelley, 448 F. Supp. 919, 926 (N.D. Ill. 1978) (supplemental opinion), reconsideration denied in pertinent part, 455 F. Supp. 324, 326 (N.D. Ill. 1978) (reiterating that methods used that are generally well known to public do not warrant Exemption 7(E) protection).

<sup>11</sup> Rosenfeld v. U.S. Dep't of Justice, 57 F.3d 803, 815 (9th Cir. 1995); see also Campbell, No. 89-3016, slip op. at 7-8 (D.D.C. Aug. 6, 1997) (ordering disclosure of information pertaining to "various pretexts" because information is known to public, requested records do not describe details of techniques, and disclosure would not undermine techniques' effectiveness); Struth v. FBI, 673 F. Supp. 949, 970 (E.D. Wis. 1987) (dismissing pretext as merely "garden variety ruse or misrepresentation"). But see Nolan v. U.S. Dep't of Justice, No. 89-2035, 1991 WL 36547, at \*8 (D. Colo. Mar. 18, 1991) (concluding that disclosure of information surrounding pretext phone call could harm ongoing investigations because similar calls might be used again), aff'd on other grounds, 973 F.2d 843 (10th Cir. 1992).

<sup>12</sup> Hamilton v. Weise, No. 95-1161, 1997 U.S. Dist. LEXIS 18900, at \*30 (M.D. Fla. Oct. 1, 1997).

<sup>13</sup> Wickline v. FBI, No. 92-1189, 1994 WL 549756, at \*5 (D.D.C. Sept. 30, 1994) (quoting Parker v. U.S. Dep't of Justice, No. 88-0760, slip op. at 8 (D.D.C. Feb. 28, 1990), aff'd in pertinent part, No. 90-5070 (D.C. Cir. June 28, 1990)); see, e.g., Brunetti v. FBI, 357 F. Supp. 2d 97, 108 (D.D.C. 2004) (agreeing with FBI's assessment that release of notations regarding "efficacy [of techniques used] would allow criminals to adapt their activities and methods in order to avoid future detection"); Delviscovo v. FBI, 903 F. Supp. 1, 3 (D.D.C. 1995) (declaring withholding of FBI accomplishment report (containing information on use and effectiveness of investigative tech-

(continued...)

## EXEMPTION 7(E)

gation and in their totality directed toward a specific investigative goal constitute a 'technique' which merits protection."<sup>14</sup> Moreover, courts have endorsed the withholding of the details of a wide variety of commonly known procedures -- for example, polygraph examinations,<sup>15</sup> undercover

---

<sup>13</sup>(...continued)

niques) to be "well established" and "proper"), summary affirmance granted, No. 95-5388 (D.C. Cir. Jan. 24, 1997); Buffalo Evening News, Inc. v. U.S. Border Patrol, 791 F. Supp. 386, 392 n.5, 393 n.6 (W.D.N.Y. 1992) (finding that Exemption 7(E) protects fact of whether alien's name is listed in INS Lookout Book and method of apprehension of alien); see also Biase v. Office of Thrift Supervision, No. 93-2521, slip op. at 12 (D.N.J. Dec. 16, 1993) (upholding protection of "investigative techniques and procedures that are either not commonly known to the public, or if publicly known, their disclosure could lessen their effectiveness"). But see Goldstein v. Office of Indep. Counsel, No. 87-2028, 1999 WL 570862, at \*14 (D.D.C. July 29, 1999) (finding that portions of two documents were improperly withheld, because they did not contain "a secret or an exceptional investigative technique," nor would their disclosure risk circumvention of law, and treating the age of the documents (ten and sixteen years old) as a significant factor).

<sup>14</sup> PHE, Inc. v. U.S. Dep't of Justice, No. 90-1461, slip op. at 7 (D.D.C. Jan. 31, 1991), aff'd in pertinent part, rev'd in part & remanded, 983 F.2d 248 (D.C. Cir. 1993); see, e.g., Judicial Watch, Inc. v. U.S. Dep't of Commerce, 337 F. Supp. 2d at 181-82 (approving withholding of "firearm specifications" and "radio frequencies" used by agents protecting Secretary of Commerce); Judicial Watch, Inc. v. FBI, No. 00-745, 2001 U.S. Dist. LEXIS 25732, at \*29-30 (D.D.C. Apr. 20, 2001) (protecting the "identities of two types of records concerning prison inmates which are often checked by FBI special agents," because even identifying the records would enable inmates "to alter their activities[,] thus hindering the effectiveness of this technique"); Hassan v. FBI, No. 91-2189, 1992 U.S. Dist. LEXIS 22655, at \*13 (D.D.C. July 13, 1992) (protecting common techniques used with uncommon technique to achieve unique investigative goal), summary affirmance granted, No. 92-5318 (D.C. Cir. Mar. 17, 1993); Beck v. U.S. Dep't of Treasury, No. 88-493, slip op. at 26-27 (D.D.C. Nov. 8, 1989) (approving nondisclosure of certain documents, including map, because disclosure would reveal surveillance technique used by Customs Service, as well as why certain individuals were contacted with regard to investigations), aff'd, 946 F.2d 1563 (D.C. Cir. 1992) (unpublished table decision).

<sup>15</sup> See, e.g., Hale v. U.S. Dep't of Justice, 973 F.2d 894, 902-03 (10th Cir. 1992) (concluding that disclosure of "polygraph matters" could lessen effectiveness), cert. granted, vacated & remanded on other grounds, 509 U.S. 918 (1993); Piper v. U.S. Dep't of Justice, 294 F. Supp. 2d 16, 30 (D.D.C. 2003) (declaring that polygraph materials were properly withheld because their release would reveal sensitive "logistical considerations"), reconsideration denied on other grounds, 312 F. Supp. 2d 17 (D.D.C. 2004); Edmonds v. FBI, 272 F. Supp. 2d 35, 56 (D.D.C. 2003) (deciding that the FBI's declara-

(continued...)

## EXEMPTION 7(E)

operations,<sup>16</sup> surveillance techniques,<sup>17</sup> and bank security measures<sup>18</sup> -- on

---

<sup>15</sup>(...continued)

tion "convincingly describes how the release of [polygraph] information might create a risk of circumvention of the law"); Shores v. FBI, 185 F. Supp. 2d 77, 85 (D.D.C. 2002) (determining that FBI properly withheld polygraph information to preserve effectiveness of polygraph examinations); Blanton v. U.S. Dep't of Justice, 63 F. Supp. 2d 35, 49-50 (D.D.C. 1999) (finding that disclosing certain polygraph information -- e.g., "sequence of questions" -- would allow individuals to employ countermeasures), aff'd, 64 F. App'x 787 (D.C. Cir. 2003); Coleman, 13 F. Supp. 2d at 83 (holding that disclosure of behavioral science analysis and details of polygraph examination would frustrate enforcement of law); Perrone v. FBI, 908 F. Supp. 24, 28 (D.D.C. 1995) (finding that release of precise polygraph questions and their sequence would allow circumvention of examination). But see Homick v. U.S. Dep't of Justice, No. 98-00557, slip op. at 14-15, 32 (N.D. Cal. Sept. 16, 2004) (ordering the disclosure of the details of a twenty-year-old polygraph test, including "the type of test given, the number of charts, and the serial number of the polygraph machine," because "the FBI has provided no statement that the type of machine, test, and number of charts used twenty years ago are the same or similar to those utilized today"), appeal dismissed voluntarily, No. 04-17568 (9th Cir. July 5, 2005).

<sup>16</sup> See, e.g., LaRouche v. U.S. Dep't of Justice, No. 90-2753, slip op. at 21 (D.D.C. Nov. 17, 2000) (rejecting plaintiff's argument that information regarding techniques for undercover work must be released, because even "widely known techniques" are entitled to protection when their disclosure would negatively affect future investigations); Sinito v. U.S. Dep't of Justice, No. 87-0814, 2000 U.S. Dist. LEXIS 22504, at \*45-48 (D.D.C. July 12, 2000) (holding that the disclosure of information about an "electronic recording device" (a body microphone) "would impair the FBI's ability to conduct future investigations"), summary affirmance granted, 22 F. App'x 1 (D.C. Cir. 2001); Rosenberg v. Freeh, No. 97-0476, slip op. at 17 (D.D.C. May 13, 1998) (protecting "information on the use of false identities for undercover special agents," because disclosure "could significantly reduce [the] future effectiveness of this investigative technique"), aff'd, No. 99-5209, 1999 WL 1215961 (D.C. Cir. Nov. 12, 1999) (per curiam); Foster v. U.S. Dep't of Justice, 933 F. Supp. 687, 693 (E.D. Mich. 1996) (holding that release of techniques and guidelines used in undercover operations would diminish their effectiveness); Wagner v. FBI, No. 90-1314, 1991 U.S. Dist. LEXIS 7506, at \*7 (D.D.C. June 4, 1991) (holding that exemption protects detailed surveillance and undercover investigative methods and techniques), summary affirmance granted, No. 91-5220 (D.C. Cir. Aug. 3, 1992). But see also Homick, No. 98-00557, slip op. at 33 (N.D. Cal. Sept. 16, 2004) (ordering the release of records generally related to the "establishment of a nationwide undercover program utilized by the FBI," because the FBI's "justification [for withholding] is wholly conclusory").

<sup>17</sup> See, e.g., Masters v. ATF, No. 04-2274, slip op. at 18-19 (D.D.C. Sept.

(continued...)

## EXEMPTION 7(E)

the basis that disclosure could reduce or even nullify the effectiveness of such procedures.<sup>19</sup> As one court recently observed pragmatically, this is

---

<sup>17</sup>(...continued)

25, 2006) (protecting details of electronic surveillance techniques not widely known to public -- including their circumstances, timing, and location -- and finding that plaintiff "merely speculates" that public is aware of such details); Shores, 185 F. Supp. 2d at 85 (protecting details of surveillance operations at federal prison, including information about telephone system); Burke v. DEA, No. 96-1739, slip op. at 9 (D.D.C. Mar. 31, 1998) (upholding Postal Service's refusal to disclose detailed description of surveillance techniques); Steinberg v. U.S. Dep't of Justice, No. 93-2409, slip op. at 15-16 (D.D.C. July 14, 1997) (approving nondisclosure of precise details of telephone and travel surveillance despite fact that criminals know that such techniques are used generally); Butler v. Dep't of the Treasury, No. 95-1931, 1997 WL 138720, at \*4 (D.D.C. Jan. 14, 1997) (reasoning that disclosing methods of monitoring and type of equipment used could enable future targets to avoid surveillance).

<sup>18</sup> See, e.g., Maguire v. Mawn, No. 02 Civ. 2164, 2004 WL 1124673, at \*3 (S.D.N.Y. May 19, 2004) (protecting the details of a bank's use of "bait money," although it is a publicly known technique, because "disclosure . . . could reasonably make the [b]ank more susceptible to robberies in the future"); Williams v. U.S. Dep't of Justice, No. 02-2452, slip op. at 11-12 (D.D.C. Feb. 4, 2004) (protecting "serial numbers on bait money" because disclosing this aspect of this "technique would undercut its usefulness"), reconsideration denied (D.D.C. Mar. 10, 2004), aff'd per curiam, 171 F. App'x 857 (D.C. Cir. 2005); Rivera, No. 98-0649, slip op. at 9-10 (D.D.C. Aug. 31, 1999) (upholding categorical protection for bank security measures); Dayton Newspapers, Inc. v. FBI, No. C-3-85-815, 1993 WL 1367435, at \*6 (S.D. Ohio Feb. 9, 1993) (concluding that FBI properly withheld details of bank security devices and equipment used in bank robbery investigation); Malloy v. U.S. Dep't of Justice, 457 F. Supp. 543, 545 (D.D.C. 1978) (protecting details concerning "bait money" and "bank security devices").

<sup>19</sup> See, e.g., Hale, 973 F.2d at 902-03 (concluding that disclosure of use of security devices and their modus operandi could lessen their effectiveness); Bowen v. FDA, 925 F.2d 1225, 1229 (9th Cir. 1991) (deciding that release of specifics of cyanide-tracing techniques would present serious threat to future product-tampering investigations); Cal-Trim, Inc. v. IRS, No. 05-2408, slip op. at 6-8 (D. Ariz. Feb. 6, 2007) (protecting certain records from ongoing IRS investigation because release could allow the individuals under investigation "to craft explanations or defenses based on the [IRS] agent's analysis or enable them the opportunity to disguise or conceal the transactions that are under investigation"); Whitfield v. U.S. Dep't of the Treasury, No. 04-0679, 2006 WL 2434923, at \*5-6 (D.D.C. Aug. 22, 2006) (concluding that details of arrest procedures were properly withheld because disclosure could assist suspects in avoiding arrest) (appeal pending); Judicial Watch, Inc. v. Dep't of Commerce, 337 F. Supp. 2d at 181-82

(continued...)

## EXEMPTION 7(E)

especially true "when the method employed is meant to operate clandestinely, unlike [other techniques] that serve their crime-prevention purpose by operating in the open."<sup>20</sup>

Indeed, because of the nature of the underlying information, defending nondisclosures under the first clause of Exemption 7(E) often must be approached with special care; accordingly, courts have permitted agencies

---

<sup>19</sup>(...continued)

(protecting details of techniques used to "identify parties and transactions that should be monitored for violations of [agency] regulations," as disclosure would indicate "what kinds of action [agency] categorizes as significant and what kinds of action may be considered less significant" (quoting agency declaration)); Maydak v. U.S. Dep't of Justice, 362 F. Supp. 2d 316, 320 (D.D.C. 2005) (holding that the Bureau of Prisons properly withheld techniques that were "used to detect that plaintiff was sending requests to security agencies while claiming he was a staff member," because disclosure "would assist an inmate in correlating the use of a particular investigative technique with its corresponding effectiveness" (quoting agency declaration)); Piper, 294 F. Supp. 2d at 31 (observing that the public's "[g]eneral, non-specific knowledge that the FBI possesses capabilities to electronically monitor the movement of automobiles . . . is not the same as identifying the actual device, its function, and its capabilities"); Peralta v. U.S. Attorney's Office, 69 F. Supp. 2d 21, 35 (D.D.C. 1999) (upholding redaction of FBI Forms FD-515, which rank effectiveness of techniques, as well as information that would identify radio channels used during surveillance and transmitter numbers used to monitor conversations, in order "to prevent potential harm to future law enforcement activities"); Pons v. U.S. Customs Serv., No. 93-2094, 1998 U.S. Dist. LEXIS 6084, at \*20 (D.D.C. Apr. 23, 1998) (protecting "cooperative arrangements between Customs and other law enforcement agencies" to keep them effective); Code v. FBI, No. 95-1892, 1997 WL 150070, at \*8 (D.D.C. Mar. 26, 1997) (recognizing that disclosure of criminal personality profiles could assist criminals in evading detection); Pray v. Dep't of Justice, 902 F. Supp. 1, 4 (D.D.C. 1995) (concluding that release of information about particular investigative techniques and their effectiveness in FBI accomplishment report could enable criminals to employ countermeasures to neutralize their effectiveness), summary affirmation granted in pertinent part, 1996 WL 734142 (D.C. Cir. Nov. 20, 1996); Fisher v. U.S. Dep't of Justice, 772 F. Supp. 7, 12 (D.D.C. 1991) (finding that disclosure could alert subjects of investigation about FBI techniques); see also FOIA Update, Vol. V, No. 2, at 5 (discussing scope of Exemption 7(E) protection as encompassing "obscure or secret techniques" (quoting Jaffe v. CIA, 573 F. Supp. 377, 387 (D.D.C. 1983))). But cf. Gerstein v. U.S. Dep't of Justice, No. 03-04893, 2005 U.S. Dist. LEXIS 41276, at \*38-43 (N.D. Cal. Sept. 30, 2005) (ordering the release of a compilation detailing each United States Attorney's Office's use of certain delayed-notice warrants, because the technique "is a matter of common knowledge" and disclosure would not reduce the technique's effectiveness).

<sup>20</sup> Maguire, 2004 WL 1124673, at \*3.

## EXEMPTION 7(E)

to describe secret law enforcement techniques in only general terms, where necessary, while withholding the full details.<sup>21</sup> Of course, this does not obviate an agency's duty to provide the most complete public declaration possible, as demonstrated by several court decisions finding agencies' declarations to be inadequate.<sup>22</sup> In many circumstances, though, it is not

---

<sup>21</sup> See, e.g., Bowen, 925 F.2d at 1229 (ruling that release of specifics of cyanide-tracing techniques would present serious threat to future product-tampering investigations); Cohen v. Smith, No. 81-5365, slip op. at 8 (9th Cir. Mar. 25, 1983) (protecting details of telephone interviews); Carbe v. ATF, No. 03-1658, 2004 WL 2051359, at \*11 (D.D.C. Aug. 12, 2004) (finding that "electronic surveillance request forms and asset forfeiture reimbursement forms . . . [are] [c]ertainly . . . protected from release by Exemption 7(E)," as disclosure "might reveal the nature of electronic equipment and the sequence of its uses"); Peyton v. Reno, No. 98-1457, 2000 WL 141282, at \*1 (D.D.C. Jan. 6, 2000) (protecting Discriminant Function Scores used to select tax returns for evaluation); Klunzinger v. IRS, 27 F. Supp. 2d 1015, 1027-28 (W.D. Mich. 1998) (upholding protection of documents which, if disclosed, would "reveal confidential information regarding when the IRS would undertake compliance activity"); Laroque v. U.S. Dep't of Justice, No. 86-2677, 1988 WL 75942, at \*3 (D.D.C. July 12, 1988) (protecting "Reason and Source codes" in State Department "lookout notices," which are not generally known to public); U.S. News & World Report v. Dep't of the Treasury, No. 84-2303, 1986 U.S. Dist. LEXIS 27634, at \*8 (D.D.C. Mar. 26, 1986) (protecting Secret Service's contract specifications for President's armored limousine); Hayward v. U.S. Dep't of Justice, 2 Gov't Disclosure Serv. (P-H) ¶ 81,231, at 81,646 (D.D.C. July 14, 1981) (protecting methods and techniques used by Marshals Service to relocate protected witnesses); Ott v. Levi, 419 F. Supp. 750, 752 (E.D. Mo. 1976) (protecting laboratory techniques used in arson investigation).

<sup>22</sup> See, e.g., Boyd v. ATF, No. 05-1096, 2006 WL 2844912, at \*9 (D.D.C. Sept. 29, 2006) (criticizing the agency's "inadequate" Vaughn Index, as it "tend[s] to recite the language of the FOIA exemption and refer to the Vaughn indices, without explaining why the release of the information would compromise law enforcement"); Long v. U.S. Dep't of Justice, 450 F. Supp. 2d 42, 79 (D.D.C.) (rejecting the agency's Exemption 7(E) argument, which essentially restated the statutory standard, because it "failed to identify any law enforcement technique or procedure that would be disclosed upon release of the information"), amended by 457 F. Supp. 2d 30 (D.D.C. 2006), amended further on reconsideration, Nos. 00-0211 & 02-2467, 2007 WL 293508 (D.D.C. Feb. 2, 2007), stay granted (D.D.C. Feb. 13, 2007); Homick, No. 98-00557, slip op. at 14-15, 32 (N.D. Cal. Sept. 16, 2004) (ordering disclosure of records concerning twenty-year-old polygraph test because FBI failed to show that similar techniques were still in use at time of withholding); Prescott v. Dep't of Justice, No. 00-187, slip op. at 5, 11-12 (D.D.C. Aug. 10, 2001) (upholding the redaction of FBI Form FD-515 because the FBI specified the potential harm from release, while rejecting another agency's invocation of Exemption 7(E) to withhold other "informa-

(continued...)

## EXEMPTION 7(E)

possible to describe secret law enforcement techniques even in general terms without disclosing the very information sought to be withheld.<sup>23</sup> A court's in camera review of the documents at issue may be required to demonstrate the propriety of nondisclosure in such cases.<sup>24</sup>

---

<sup>22</sup>(...continued)

tion regarding investigative techniques and procedures" (quoting agency's declaration), because the other agency "merely reiterated the statutory language"; Smith, 977 F. Supp. at 501 (explaining that although an agency might not be able to discuss the details of certain techniques, "that does not excuse the agency from providing the Court with information sufficient for it to decide whether the material is properly withheld under Exemption 7(E)," and rejecting the agency's declaration as "conclusory"); Feshbach v. SEC, 5 F. Supp. 2d 774, 786-87 & n.11 (N.D. Cal. 1997) (finding the SEC's reasons for withholding checklists and internal database to be conclusory and insufficient); Linn v. U.S. Dep't of Justice, No. 92-1406, 1995 WL 417810, at \*26 (D.D.C. June 6, 1995) (rejecting invocation of Exemption 7(E) because no justification was provided to show how release of commonly known technique could interfere with future law enforcement efforts).

<sup>23</sup> See Boyd, 2006 WL 2844912, at \*9; Morley, 2006 WL 2806561, at \*14; Smith, 977 F. Supp. at 501; see also, e.g., Gonzalez v. ATF, No. 04-2281, 2005 WL 3201009, at \*9-10 (D.D.C. Nov. 9, 2005) (permitting the withholding of information pertaining to an unspecified law enforcement technique, and accepting the agency's attestations that disclosure "could limit its future effectiveness" and "would allow criminals to develop countermeasures against the technique"); McQueen v. United States, 264 F. Supp. 2d 502, 521 (S.D. Tex. 2003) (finding that requested documents show "details [that], by themselves, would reveal law enforcement techniques" and thus were properly withheld), summary affirmance granted on other grounds, 100 F. App'x 964 (5th Cir. 2004); Butler, 1997 WL 138720, at \*4 (observing that "[i]t is sometimes impossible to describe secret law enforcement techniques without disclosing the information sought to be withheld"); Coleman, 13 F. Supp. 2d at 83 (permitting the FBI to withhold the "manner and circumstances" of identified techniques, because "[f]urther explanation of these techniques . . . would effectively expose the core of information sought to be protected"); Soto v. DEA, No. 90-1816, slip op. at 7 (D.D.C. Apr. 13, 1992) (concluding that detailed description of technique pertaining to detection of drug traffickers would effectively disclose it); cf. Schwanner v. Dep't of the Air Force, 898 F.2d 793, 796 (D.C. Cir. 1990) (observing that under the "high 2" aspect of Exemption 2, "courts have also exempted materials that are so closely related to rules and practices that disclosure could lead to disclosure of the rule or practice itself").

<sup>24</sup> See, e.g., Jones v. FBI, 41 F.3d 238, 249 (6th Cir. 1994) (concluding, upon in camera review, that investigative techniques were properly withheld); Mayer, Brown, Rowe & Maw LLP v. IRS, No. 04-2187, 2006 WL 2425523, at \*8 (D.D.C. Aug. 21, 2006) (directing the defendant agency to submit "a representative sample of the [withheld] records for in camera re-

(continued...)

## EXEMPTION 7(E)

Prior to the enactment of the Freedom of Information Reform Act of 1986,<sup>25</sup> Exemption 7(E) protected law enforcement techniques and procedures only when they could be regarded as "investigatory" or "investigative" in character,<sup>26</sup> but this limitation was removed by those FOIA amendments.<sup>27</sup> Exemption 7(E), as amended in 1986, simply covers "techniques

---

<sup>24</sup>(...continued)

view" because the agency's declaration did not have sufficient detail to permit a ruling on the applicability of Exemption 7(E)), further opinion, No. 04-2187, slip op. at 2-3 (D.D.C. Oct. 24, 2006) (concluding after in camera review that Exemption 7(E) was properly applied); ACLU v. FBI, No. 05-1004, 2006 WL 2303103, at \*1 (D.D.C. Aug. 9, 2006) (granting summary judgment to the defendant agency after "conduct[ing] an in camera, ex parte review of the disputed documents"); Palacio v. U.S. Dep't of Justice, No. 00-1564, 2002 U.S. Dist. LEXIS 2198, at \*29 (D.D.C. Feb. 11, 2002) (ordering the FBI to provide greater detail concerning information withheld under Exemption 7(E), or to submit for in camera review either the documents at issue or a detailed declaration "[i]f the necessary detail would disclose the very information it seeks to withhold"), summary affirmance granted on other grounds, No. 02-5247, 2003 WL 242751 (D.C. Cir. Jan. 31, 2003); Allnutt v. U.S. Dep't of Justice, No. 98-901, 2000 WL 852455, at \*1-2 (D. Md. Oct. 23, 2000) (finding, upon in camera review, that computer command codes used to access federal databases were properly withheld), aff'd sub nom. Allnutt v. Handler, 8 F. App'x 225 (4th Cir. 2001); Smith, 977 F. Supp. at 501 (concluding that agency must either provide greater detail about records withheld or submit records for in camera review); Pub. Employees for Env'tl. Responsibility, 978 F. Supp. at 961-62 (concluding, upon in camera review, that certain documents must be released while others may be withheld); Campbell v. U.S. Dep't of Justice, No. 89-3016, 1996 WL 554511, at \*10 (D.D.C. Sept. 19, 1996) (directing in camera submission of technique information at issue), rev'd & remanded on other grounds, 164 F.3d 20 (D.C. Cir. 1998); Linn v. U.S. Dep't of Justice, No. 92-1406, 1997 WL 577586, at \*4 (D.D.C. May 29, 1997) (determining that in camera inspection was necessary because DEA had not provided specific, nonconclusory explanation to justify withholding of what it identified as law enforcement technique); Rojem v. U.S. Dep't of Justice, 775 F. Supp. 6, 12 (D.D.C. 1991) (ordering in camera inspection), subsequent decision, No. 90-3021, 1991 WL 241931, at \*1 (D.D.C. Oct. 31, 1991) (upholding Exemption 7(E) upon in camera inspection), appeal dismissed for failure to timely file, No. 92-5088 (D.C. Cir. Nov. 4, 1992); Nat'l Sec. Archive v. FBI, 759 F. Supp. 872, 885 (D.D.C. 1991) (ordering the agency to submit a supplemental affidavit describing the information withheld, but finding that "[d]ue to the sensitive nature of this subject, that affidavit may be submitted in camera if necessary").

<sup>25</sup> Pub. L. No. 99-570, § 1802, 100 Stat. 3207, 3207-48, 3207-49.

<sup>26</sup> Pub. L. No. 93-502, 88 Stat. 1561, 1563 (1974).

<sup>27</sup> See, e.g., Tax Analysts v. IRS, 294 F.3d 71, 79 (D.C. Cir. 2002) (discuss-  
(continued...)

## EXEMPTION 7(E)

and procedures for law enforcement investigations or prosecutions."<sup>28</sup> As such, it authorizes the withholding of information consisting of, or reflecting, a law enforcement "technique" or a law enforcement "procedure," whenever it is used "for law enforcement investigations or prosecutions" generally.<sup>29</sup> Law enforcement manuals, including those that pertain to the "prosecutions" stage of the law enforcement process, accordingly meet the re-

---

<sup>27</sup>(...continued)

ing effects of 1986 FOIA amendments on Exemption 7(E)); Gordon v. FBI, 388 F. Supp. 2d 1028, 1036 (N.D. Cal. 2005) (rejecting the plaintiffs "narrow[]" reading of the "law enforcement purpose" requirement of Exemption 7(E), and noting that it "is not limited to documents created in connection with a criminal investigation").

<sup>28</sup> 5 U.S.C. § 552(b)(7)(E).

<sup>29</sup> Id.; see Attorney General's 1986 Amendments Memorandum at 15; see also Nowak v. IRS, 210 F.3d 384 (9th Cir. 2000) (unpublished table decision) (affirming the district court's conclusion "that the redacted information, if disclosed, 'would significantly hamper the defendant's tax collection and law enforcement functions, and facilitate taxpayer circumvention of federal Internal Revenue laws'" (quoting agency declaration)); Mosby v. U.S. Marshals Serv., No. 04-2083, 2005 WL 3273974, at \*5 (D.D.C. Sept. 1, 2005) (finding that "administrative and operational guidelines and procedures" were properly withheld, as the contents "would provide assistance to persons threatening individuals and property protected by the USMS and allow fugitives to avoid apprehension"); Tran v. U.S. Dep't of Justice, No. 01-0238, 2001 WL 1692570, at \*3 (D.D.C. Nov. 20, 2001) (concluding that INS form -- used when agencies share information from immigration records -- was properly withheld because it would reveal law enforcement techniques); Unger v. Dist. Disclosure Office IRS, No. 99-698, 2000 WL 1009493, at \*4 (N.D. Ohio Mar. 28, 2000) (finding that IRS properly withheld references to "specific dollar tolerance" used as "threshold in determining whether to prosecute"); Guerrero v. DEA, No. 93-2006, slip op. at 14-15 (D. Ariz. Feb. 22, 1996) (holding that Exemption 7(E) properly protects portions of DEA Agents Manual concerning undercover operations, confidential informant codes, surveillance devices, and enforcement and security procedures); Hammes v. U.S. Customs Serv., No. 94 Civ. 4868, 1994 WL 693717, at \*1 (S.D.N.Y. Dec. 9, 1994) (protecting Customs Service criteria used to determine which passengers to stop and examine); Windels, Marx, Davies & Ives v. Dep't of Commerce, 576 F. Supp. 405, 414 (D.D.C. 1983) (finding "consistent with other cases . . . that Exemption 7(E) shields computer codes" and programs because their disclosure "would reveal investigative procedures"). But see Herrick's Newsletter, 2006 WL 1826185, at \*8 (holding that a portion of an agency manual pertaining to the destruction of seizure of property is not related to a law enforcement investigation and instead "relate[s] only to the conservation of the agency's physical and monetary resources"); Cowsen-El v. U.S. Dep't of Justice, 826 F. Supp. 532, 533-34 (D.D.C. 1992) (finding Bureau of Prisons program statement to be internal policy document wholly unrelated to investigations or prosecutions).

## EXEMPTION 7(E)

quirements for withholding under Exemption 7(E) to the extent that they consist of, or reflect, law enforcement techniques and procedures that are confidential and must remain so in order to preserve their effectiveness.<sup>30</sup>

The second clause of Exemption 7(E) protects "guidelines for law enforcement investigations or prosecutions if [their] disclosure could reasonably be expected to risk circumvention of the law."<sup>31</sup> As such, it has a distinct harm standard built into it -- not unlike the "anti-circumvention," "high 2" aspect of Exemption 2 -- and it indeed has considerable overlap with this aspect of Exemption 2 in general.<sup>32</sup> (See the discussion under Exemption 2, "High 2": Risk of Circumvention, above.) This distinct protection is intended to ensure proper protection for the type of law enforcement guideline in-

---

<sup>30</sup> See Attorney General's 1986 Amendments Memorandum at 16; accord Attorney General's Memorandum for Heads of All Federal Departments and Agencies Regarding the Freedom of Information Act (Oct. 12, 2001) [hereinafter Attorney General Ashcroft's FOIA Memorandum], reprinted in FOIA Post (posted 10/15/01) (emphasizing the fundamental societal value of "enhancing the effectiveness of our law enforcement agencies"); see, e.g., Herick's Newsletter, 2006 WL 1826185, at \*7 (protecting many portions of a manual pertaining to seized property, including details of "the transport, seizure, storage, testing, physical security, evaluation, maintenance, and cataloguing of, as well as access to, seized property"); Guerrero, No. 93-2006, slip op. at 14-15 (D. Ariz. Feb. 22, 1996) (approving nondisclosure of portions of DEA Agents Manual); Church of Scientology Int'l v. IRS, 845 F. Supp. 714, 723 (C.D. Cal. 1993) (concluding that parts of IRS Law Enforcement Manual concerning "procedures for handling applications for tax exemption and examinations of Scientology entities" and memorandum regarding application of such procedures were properly withheld); Williston Basin Interstate Pipeline Co. v. FERC, No. 88-0592, 1989 WL 44655, at \*2 (D.D.C. Apr. 17, 1989) (finding portions of a regulatory audit describing the significance of each page in an audit report, investigatory technique utilized, and the auditor's conclusions to constitute "the functional equivalent of a manual of investigative techniques").

<sup>31</sup> 5 U.S.C. § 552(b)(7)(E).

<sup>32</sup> See, e.g., Coastal Delivery Corp., 272 F. Supp. 2d at 965 (concluding that agency properly applied Exemption 2 for same reasons that it applied Exemption 7(E)); Schwarz v. U.S. Dep't of Treasury, 131 F. Supp. 2d 142, 150 (D.D.C. 2000) (finding Secret Service information evaluating personal characteristics and threat potential of individuals to be "clearly exempt from disclosure" under both Exemptions 2 and 7(E)), summary affirmance granted, No. 00-5453, 2001 WL 674636 (D.C. Cir. May 10, 2001); see also Berg v. Commodity Futures Trading Comm'n, No. 93 C 6741, slip op. at 11 n.2 (N.D. Ill. June 23, 1994) (magistrate's recommendation) ("[I]t would appear that exemption (b)(7)(E) is essentially a codification of the 'high 2' exemption[.]" ), accepted & dismissed per stipulation (N.D. Ill. July 26, 1994); see also FOIA Update, Vol. XV, No. 2, at 3 (discussing the "firm 'harm' requirement already built into" Exemptions 2 and 7(E), among others).

## EXEMPTION 7(E)

formation found ineligible to be withheld in the en banc decision of the Court of Appeals for the District of Columbia Circuit in Jordan v. Department of Justice,<sup>33</sup> a case involving guidelines for prosecutions. It reflects a dual concern with the need to remove any lingering effect of that decision, while at the same time ensuring that agencies do not unnecessarily maintain "secret law" establishing standards that are used to regulate societal behavior.<sup>34</sup>

This clause of Exemption 7(E) therefore is available to protect any "law enforcement guideline" information of the type involved in Jordan, whether it pertains to the prosecution or basic investigative stage of a law enforcement matter, whenever it is determined<sup>35</sup> that its disclosure "could reasonably be expected to risk circumvention of the law."<sup>36</sup> In taking this

---

<sup>33</sup> 591 F.2d 753, 771 (D.C. Cir. 1978) (en banc).

<sup>34</sup> See S. Rep. No. 98-221, at 25 (1983); Attorney General's 1986 Amendments Memorandum at 16-17; see also Gordon, 388 F. Supp. 2d at 1036-37 (requiring disclosure of "the legal basis for detaining someone whose name appears on a watch list"); Don Ray Drive-A-Way Co. of Cal. v. Skinner, 785 F. Supp. 198, 200 (D.D.C. 1992) (finding that disclosure of safety ratings system is necessary to permit regulated entities to know what agency considers to be most serious safety breaches).

<sup>35</sup> See Buckner v. IRS, 25 F. Supp. 2d 893, 899 (N.D. Ind. 1998) (finding that "the age of the [DIF] scores is of no consequence" in upholding protection of Discriminant Function Scores used to evaluate tax returns). But see also Homick, No. 98-00557, slip op. at 14-15, 32 (N.D. Cal. Sept. 16, 2004) (taking age of records into account in ordering disclosure because agency failed to show that same technique was currently in use).

<sup>36</sup> See, e.g., PHE, Inc. v. Dep't of Justice, 983 F.2d 248, 251 (D.C. Cir. 1993) (holding that "release of FBI guidelines as to what sources of information are available to its agents might encourage violators to tamper with those sources of information and thus inhibit investigative efforts"); Sussman v. U.S. Marshall Serv., No. 03-610, 2005 WL 3213912, at \*9 (D.D.C. Oct. 13, 2005) (protecting "procedures utilized in investigation [of] threats against federal court employees," because release "could create a risk of circumvention of the law") (appeal pending); Carp v. IRS, No. 00-5992, 2002 WL 373448, at \*6 (D.N.J. Jan. 28, 2002) (concluding, after in camera review, that disclosure "would risk circumvention of the law by exposing specific, non-routine investigative techniques used by the IRS to uncover tax fraud"); Tax Analysts v. IRS, 152 F. Supp. 2d 1, 17 (D.D.C. 2001) (determining that disclosure of agency summary of tax-avoidance scheme, "including identification of vulnerabilities" in IRS operations, could risk circumvention of law), rev'd & remanded on other grounds, 294 F.3d 71 (D.C. Cir. 2002); Wishart v. Comm'r, No. 97-20614, 1998 WL 667638, at \*6 (N.D. Cal. Aug. 6, 1998) (protecting Discriminant Function Scores to avoid possibility that "taxpayers could manipulate" return information to avoid IRS audits), aff'd,  
(continued...)

## EXEMPTION 7(E)

approach, Congress notably employed the more relaxed harm standard used in most of Exemption 7, also making clear that it was "guided by the 'circumvention of the law' standard"<sup>37</sup> that had been established by the D.C. Circuit in Crooker v. ATF.<sup>38</sup>

Accordingly, in applying this second clause of Exemption 7(E) to law enforcement manuals, agencies should focus on the portions of those guidelines that correlate to particular harm to law enforcement efforts<sup>39</sup>

---

<sup>36</sup>(...continued)

199 F.3d 1334 (9th Cir. 1999) (unpublished table decision); Voinche v. FBI, 940 F. Supp. 323, 331 (D.D.C. 1996) (upholding nondisclosure of Criminal Intelligence Digest used to assist and guide FBI personnel), aff'd per curiam, No. 96-5304, 1997 WL 411685 (D.C. Cir. June 19, 1997); Jimenez v. FBI, 938 F. Supp. 21, 30 & n.6 (D.D.C. 1996) (approving invocation of Exemption 7(E) to protect gang-validation criteria used by Bureau of Prisons to determine whether individual is gang member); Pully v. IRS, 939 F. Supp. 429, 437 (E.D. Va. 1996) (finding that the release of Discriminant Function Scores would enable taxpayers to "develop techniques to avoid 'flagging' [by] the IRS computers"); Silber v. U.S. Dep't of Justice, No. 91-876, transcript at 25 (D.D.C. Aug. 13, 1992) (bench order) (ruling that disclosure of a Department of Justice monograph on fraud litigation "would present the specter of circumvention of the law"); Ctr. for Nat'l Sec. Studies, 1990 WL 236133, at \*5-6 (recognizing that release of INS plans to be deployed in event of attack on U.S. could assist terrorists in circumventing border control). But see also Church of Scientology v. IRS, 816 F. Supp. 1138, 1162 (W.D. Tex. 1993) (holding that the IRS did not establish how release of records "regarding harassment of Service employees" written during an investigation "could reasonably be expected to circumvent the law"), appeal dismissed per stipulation, No. 93-8431 (5th Cir. Oct. 21, 1993).

<sup>37</sup> S. Rep. No. 98-221, at 25 (1983); see Attorney General's 1986 Amendments Memorandum at 17; see also NARA v. Favish, 541 U.S. 157, 169 (evincing the Supreme Court's reliance on "the Attorney General's consistent interpretation of" the FOIA in successive such Attorney General memoranda), reh'g denied, 541 U.S. 1057 (2004).

<sup>38</sup> 670 F.2d 1051 (D.C. Cir. 1981) (en banc).

<sup>39</sup> See, e.g., PHE, 983 F.2d at 252 (finding that the Department of Justice's National Obscenity Enforcement Unit failed to submit an affidavit containing "precise descriptions of the nature of the redacted material and providing reasons why releasing each withheld section would create a risk of circumvention of the law"); Antonelli v. ATF, No. 04-1180, 2005 U.S. Dist. LEXIS 17089, at \*30 (D.D.C. Aug. 16, 2005) (rejecting the agency's general averments of harm, because a "mere recitation of the statutory language does not satisfy its burden of proof"), summary judgment granted in pertinent part, No. 04-1180, 2006 WL 3147675, at \*1 (D.D.C. Nov. 1, 2006) (protecting "collection techniques used [by the Bureau of Prisons] to conduct

(continued...)

## EXEMPTION 7(E)

and at the same time should make every effort to meet their obligations to disclose all reasonably segregable, nonexempt information.<sup>40</sup> (See the further discussions of this point under Procedural Requirements, "Reasonably Segregable" Obligation, above, and Litigation Considerations, "Reasonably Segregable" Requirements, below.)

Overall, it also is worth focusing on the potential role of both clauses of Exemption 7(E) in protecting homeland security-related information. In the current post-September 11, 2001 environment, law enforcement information that might be covered by this exemption should be viewed in light of its potential for causing harm -- or risking danger -- to individuals or to the public collectively.<sup>41</sup> It is vitally important in all instances to conduct a careful review of any information of homeland security sensitivity in order to evaluate any likelihood of disclosure harm, either in the form of potential danger to a person or persons or as a consequence of circumvention of law

---

<sup>39</sup>(...continued)

an investigation" because disclosure could risk circumvention of the law (quoting agency declaration)); Leveto v. IRS, No. 98-285, 2001 U.S. Dist. LEXIS 5791, at \*21 (W.D. Pa. Apr. 10, 2001) (protecting dollar amount budgeted for agency to investigate particular individual, because release could allow others to learn agency's monetary limits and undermine such investigations in future); Linn, 1995 WL 417810, at \*32 (affirming nondisclosure of one page from Drug Agent's Guide to Forfeiture of Assets on basis that agency explained harm).

<sup>40</sup> See PHE, 983 F.2d at 252 (remarking that the agency's "vague and conclusory" affidavit might have "established a legitimate basis for withholding" had it "clearly indicated why disclosable material could not be segregated from exempted material"); see, e.g., Wightman v. ATF, 755 F.2d 979, 982-83 (1st Cir. 1985) (remanding for determination of segregability) (Exemption 2); Voinche v. FBI, 412 F. Supp. 2d 60, 69 (criticizing the agency's "conclusory statements," and ordering it to "either release the information withheld . . . or provide a satisfactory Vaughn index, including a proper segregability analysis"), summary judgment granted, 425 F. Supp. 2d 134, 135 & n.2 (D.D.C. 2006) (noting that agency ultimately released information at issue in its entirety); cf. Schreibman v. U.S. Dep't of Commerce, 785 F. Supp. 164, 166 (D.D.C. 1991) (requiring agency to segregate and release portions of documents that merely identify computer systems rather than contain security plans, which remain protected as vulnerability assessments) (Exemption 2); see also FOIA Update, Vol. XIV, No. 3, at 11-12 ("OIP Guidance: The 'Reasonable Segregation' Obligation").

<sup>41</sup> See Attorney General Ashcroft's FOIA Memorandum, reprinted in FOIA Post (posted 10/15/01) (emphasizing that agencies should "carefully consider the protection of," inter alia, law enforcement interests when reviewing law enforcement records).

or regulation.<sup>42</sup>

Indeed, courts increasingly are recognizing the appropriate application of Exemption 7(E) to such sensitive information, including:

- (1) guidelines for response to terrorist attacks;<sup>43</sup>
- (2) records pertaining to aviation "watch lists";<sup>44</sup>
- (3) inspection statistics of an international seaport;<sup>45</sup>
- (4) analyses of security procedures;<sup>46</sup> and
- (5) records pertaining to domestic terrorism investigations.<sup>47</sup>

---

<sup>42</sup> See *FOIA Post*, "FOIA Officers Conference Held on Homeland Security" (posted 7/3/03) (summarizing authority for protecting homeland security-related information up to that date); accord Attorney General Ashcroft's FOIA Memorandum, reprinted in *FOIA Post* (posted 10/15/01) ("I encourage your agency to carefully consider the protection of all [applicable] values and interests when making disclosure determinations under the FOIA.").

<sup>43</sup> See *Ctr. for Nat'l Sec. Studies*, 1990 WL 236133, at \*5-6 (accordings Exemption 7(E) protection to final contingency plan in event of attack on United States, to guidelines for response to terrorist attacks, and to contingency plans for immigration emergencies).

<sup>44</sup> See *Gordon*, 388 F. Supp. 2d at 1035-36 (protecting details of FBI's aviation "watch list" program -- including records detailing "selection criteria" for lists and handling and dissemination of lists, and "addressing perceived problems in security measures").

<sup>45</sup> See *Coastal Delivery Corp.*, 272 F. Supp. 2d at 963-65 (protecting number of examinations at particular seaport because information could be used in conjunction with other publicly available information to discern rates of inspection at that port, thereby allowing for identification of "vulnerable ports" and target selection).

<sup>46</sup> See, e.g., *Voinche*, 940 F. Supp. at 329, 332 (approving the nondisclosure of information "relating to the security of the Supreme Court building and the security procedures for Supreme Court Justices" on the basis of both Exemptions 2 and 7(E)); cf. *U.S. News & World Report*, 1986 U.S. Dist. LEXIS 27634, at \*8 (upholding protection of Secret Service's contract specifications for President's armored limousine); *Hayward*, 2 Gov't Disclosure Serv. (P-H), at 81,646 (protecting methods and techniques used by Marshals Service to relocate protected witnesses).

<sup>47</sup> See *ACLU v. FBI*, 429 F. Supp. 2d 179, 194 (D.D.C. 2006) (holding that the agency properly withheld certain records the release of which "could allow individuals 'to develop countermeasures' that could defeat the effec-

(continued...)

## EXEMPTION 7(E)

Furthermore, these types of records may well be protected from disclosure under more than one FOIA exemption,<sup>48</sup> and it also is possible that such sensitive law enforcement records, even if technically not covered by Exemption 7(E), may be covered by other FOIA exemptions.<sup>49</sup> (See the discussions of this point under Exemption 2, Homeland Security-Related Information, above, and Exemption 7(F), below.)

In sum, law enforcement agencies -- including the wide range of agencies that discharge national security- and homeland security-related responsibilities<sup>50</sup> -- may avail themselves of the distinct protections provided in Exemption 7(E)'s two clauses.<sup>51</sup> Their law enforcement records, to

---

<sup>47</sup>(...continued)

tiveness of the agency's domestic terrorism investigations" (quoting agency declaration)).

<sup>48</sup> See, e.g., Gordon, 388 F. Supp. 2d at 1035-36 (applying Exemptions 2 and 7(E) to same information); Coastal Delivery Corp., 272 F. Supp. 2d at 963-65 (concluding that records were properly withheld under both Exemptions 2 and 7(E)); Voinche, 940 F. Supp. at 329, 332 (approving the nondisclosure of information "relating to the security of the Supreme Court building and the security procedures for Supreme Court Justices" on the basis of both Exemptions 2 and 7(E)).

<sup>49</sup> See, e.g., Herrick's Newsletter, 2006 WL 1826185, at \*8 (holding that portion of agency manual pertaining to destruction of seized property is not related to any law enforcement investigation or prosecution and cannot be withheld under Exemption 7(E), but can be withheld under Exemption 2); Living Rivers, 272 F. Supp. 2d at 1321-22 (concluding that maps of flooding likely to result from failure of Hoover Dam or Glen Canyon Dam were properly withheld under Exemption 7(F), instead of under Exemption 2 or Exemption 7(E), due largely to atypically narrow interpretation of law within particular judicial circuit).

<sup>50</sup> See, e.g., Morley, 2006 WL 2806561, at \*14 (discussing application of Exemption 7(E) to CIA procedures, and observing that "law enforcement purpose" includes national security-related government activities"); Living Rivers, 272 F. Supp. 2d at 1320-22 (treating Department of the Interior's Bureau of Reclamation as readily falling into FOIA's "law enforcement" category, even though protection was afforded under Exemption 7(F) rather than under Exemption 7(E)); cf. FOIA Post, "New Attorney General FOIA Memorandum Issued" (posted 10/15/01) (discussing the "need to protect critical systems, facilities, stockpiles, and other assets from security breaches and harm -- and in some instances from their potential use as weapons of mass destruction in and of themselves," as well as "any agency information that could enable someone to succeed in causing the feared harm").

<sup>51</sup> See Boyd v. DEA, No. 01-0524, slip op. at 7-8 (D.D.C. Mar. 8, 2002) (upholding protection under both clauses of Exemption 7(E) for highly sensi-

(continued...)

## EXEMPTION 7(F)

the extent that they can be regarded as reflecting techniques or procedures, are entitled to categorical protection under Exemption 7(E)'s first clause.<sup>52</sup> In addition, law enforcement guidelines that satisfy the broad "could reasonably be expected to risk circumvention of law" standard can be protected under Exemption 7(E)'s second clause.<sup>53</sup> (See the discussion of Exemption 2's overlapping "anti-circumvention" protection under Exemption 2, "High 2": Risk of Circumvention, above.)

## EXEMPTION 7(F)

Exemption 7(F) permits the withholding of law enforcement-related information necessary to protect the physical safety of a wide range of individuals. This exemption provides broad protection to "any individual" when disclosure of information about him "could reasonably be expected to endanger [his] life or physical safety."<sup>1</sup>

Prior to the 1986 FOIA amendments,<sup>2</sup> Exemption 7(F) by its former terms protected records that "would . . . endanger the life or physical safety of law enforcement personnel,"<sup>3</sup> and it had been invoked to protect both federal and local law enforcement officers.<sup>4</sup> Cases decided after the 1986

---

<sup>51</sup>(...continued)

tive research analysis in intelligence report properly withheld by FinCEN, Financial Crimes Enforcement Network of United States Department of the Treasury); see also Hammes, 1994 WL 693717, at \*1 (protecting Customs Service criteria used to determine which passengers to stop and examine).

<sup>52</sup> See Attorney General's 1986 Amendments Memorandum at 15-16 & n.27 (explaining that 1986 FOIA amendments eliminated requirement that law enforcement information be "investigatory" in order to be withheld under any subpart of Exemption 7); see also Smith, 977 F. Supp. at 501 ("Exemption 7(E) provides categorical protection to information related to law enforcement techniques.").

<sup>53</sup> See Attorney General's 1986 Amendments Memorandum at 17 & n.31.

<sup>1</sup> 5 U.S.C. § 552(b)(7)(F) (2000 & Supp. IV 2004).

<sup>2</sup> Pub. L. No. 99-570, § 1802, 100 Stat. 3207, 3207-48 to 3207-49 (1986).

<sup>3</sup> Pub. L. No. 93-502, 88 Stat. 1561, 1563 (1974) (subsequently amended).

<sup>4</sup> See, e.g., Maroscia v. Levi, 569 F.2d 1000, 1002 (7th Cir. 1977) (FBI Special Agents and also "other law enforcement personnel"); Barham v. Secret Serv., No. 82-2130, slip op. at 5 (W.D. Tenn. Sept. 13, 1982) (Secret Service agents); Docal v. Bennsinger, 543 F. Supp. 38, 48 (M.D. Pa. 1981) (DEA special agents, supervisory special agents, and local law enforcement officers); Nunez v. DEA, 497 F. Supp. 209, 212 (S.D.N.Y. 1980) (DEA special agents); Ray v. Turner, 468 F. Supp. 730, 735 (D.D.C. 1979) (U.S. Customs

(continued...)